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No. 99 - 2047

In the
Supreme Court of the United States

ANTHONY PALAZZOLO,
Petitioner,
v.
RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer,
and COASTAL RESOURCES MANAGEMENT COUNCIL,
Respondents.

On Writ of *Certiorari* to
the Supreme Court of Rhode Island

BRIEF OF *AMICI CURIÆ* W. FREDERICK WILLIAMS, III, AND LOUISE A. WILLIAMS ON THE MERITS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The argument of *Amici* concentrates on Petitioner Anthony Palazzolo's first question presented:

1. Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property?

The factual circumstances of *Amici*'s failed property development attempt, as set out in the Interest Section below, also shed light on Petitioner's second question presented:

2. Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "*less ambitious uses*" in order to ripen the takings claim?

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INTEREST OF *AMICI CURIÆ*

Amici W. Frederick Williams, III, and Louise A. Williams own five acres in Little Compton, Rhode Island.[1] *See Amici* Appendix ("Am. App.") at 1. Their unsuccessful efforts to build a home for themselves there has garnered attention in both local and national media.[2] Their property, which contains

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1 Pursuant to Supreme Court Rule 37.6, counsel for *Amici* state that counsel for neither Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief.

2 Copies of articles from the Wall Street Journal and the Providence Journal are included in the Appendix to this Brief. The Appendix also includes a copies of the Purchase and Sale Agreement and Deed for the Property; the September 30, 1986, Septic System Approval; and the

freshwater wetlands, is subject to regulation by the Rhode Island Department of Environmental Management ("DEM") in a manner similar to that by which coastal wetlands (such as those at issue in this case) are regulated by the Rhode Island Coastal Resources Management Council ("CRMC"). The Williamses purchased their property in 1986, after the DEM wetlands regulations were adopted. Am. App. 16. DEM regulates not only freshwater wetlands, but also installation of septic systems, and it granted the Williamses a permit to build a septic system. Am. App. at 3, 18–19. Because DEM septic officials failed to inform the Williamses that their property also needed to pass wetlands review before they could commence building, in 1988 the Williamses built a septic system and foundation on their land. *Id.* at 3–4. After the foundation and septic system were complete, DEM issued an order under its wetlands jurisdiction requiring the construction to be ripped out and the property to be restored to its condition in 1971, when DEM acquired its wetlands jurisdiction. *Id.*[3] The Williamses were unsuccessful in their court challenge to the DEM rulings. *Williams v. Durfee,* C.A. No. PC 92-1216 (Providence, R.I., Super. Ct. July 6, 1993), *cert. denied,* S.C. No. 93-503-M.P. (R.I. Feb. 24, 1994).

After the DEM's restoration order, the approximate value of the Williamses' property plummeted from $260,000 to $30,000. Am. App. at 4. The Williamses estimated that their total expenses on the property between 1988 and 1994,

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December 12, 1988, Septic System Certificate of Conformance.

3 Ironically, in this case CRMC urges that Palazzolo should have applied first to DEM for a septic system permit before applying to CRMC to fill wetlands. Respondents' Memorandum in Opposition to Petition for Writ of *Certiorari* at 18. Following CRMC's suggested order resulted in the Williamses forced removal of their own septic system.

including lost property value, legal expenses, building materials, restoration costs, professional expenses in preparing site development plans, came to more than $300,000. *Id.* Although they and their advisors had several meetings with government officials, they only submitted one formal building plan to DEM. Given the expense they have already incurred, they cannot afford to prepare another application to DEM consisting of "less ambitious development plans." *See Palazzolo v. State,* 746 A.2d 707, 714 (R.I.), *cert. granted,* 121 S. Ct. 296 (2000).[4] This is particularly so in light of the fact that, unlike the decisions of the development agency in *City of Monterey v. Del Monte Dunes, Ltd.,*[5] DEM's order gave the Williamses no idea whether and to what extent they could build anything elsewhere on their lot. Without guidance from the regulatory agency, the Williamses are in no position to expend the additional tens of thousands of dollars it would cost for them to make another attempt at securing development permission from DEM. *See* Am. App. at 1. In view of the Williamses' difficulties with DEM, they cannot find a buyer willing to take the property from them for a reasonable return on their investment. Rather than enjoying a home in a tranquil setting, they are instead prisoners of their own property, spending money maintaining (in the manner required by DEM)

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4 As small property owners attempting to build their own primary residence on the site, the Williamses similarly cannot "bid against themselves" by presenting ever less ambitious plans until the agency accepts one (in the meanwhile perhaps waiving well founded rights to more ambitious development). In order to receive their reasonable investment-backed expectations for their property, they need to be able to build a comfortable home for themselves on the site. Development plans cannot be more basic than that.

5 526 U.S. 687 (1999).

land that they can neither use nor sell. *Id.* at 3–4.

Amici seek to bring to the Court's attention their views, and the views of other similarly situated small property owners, concerning the scope of the takings clause under the Fifth Amendment to the United States Constitution. If the decision below is not reversed, under the "post-enactment purchaser" theory espoused by the Rhode Island Supreme Court, property owners who are unable to develop their own property when a confiscatory regulation is passed will be forced to bring litigation before the area is ready for development or to sell at a steep discount. People like the Williamses who inadvertently bought property that is virtually undevelopable under current regulatory schemes will have no chance to build their much anticipated retirement homes. These issues are of significance to *Amici* as well as to property owners generally. *Amici* believe that this brief may provide an additional perspective which may aid the Court in considering the issues raised by this case.

Pursuant to Supreme Court Rule 37.2, counsel for *Amici* have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Petitioner, Anthony Palazzolo ("Palazzolo").

SUMMARY OF ARGUMENT

Amici contend that a purchaser of property should not be penalized by prohibiting him or her from challenging a regulation that pre-dated the purchase, because such a theory distorts the incentives for the property's development (pp. 5–15). Moreover, awarding takings damages to post-enactment purchasers is the most efficient means of responding to inequities in development regulations (pp. 15–19).

ARGUMENT

I. BY TREATING PALAZZOLO MORE HARSHLY THAN HIS RELATED PREDECESSOR IN TITLE IN REGARD TO HIS PROPERTY DEVELOPMENT RIGHTS, THE RHODE ISLAND SUPREME COURT FAILED TO TAKE INTO ACCOUNT ADVERSE PUBLIC POLICY IMPLICATIONS.

The 1971 statute establishing CRMC[6] and CRMC's 1977 enforcement regulations were in effect when Palazzolo acquired his property by operation of law in 1978 upon the dissolution of his solely owned corporation Shore Gardens, Inc. ("SGI"). *Palazzolo,* 746 A.2d at 710–11. CRMC determined that Palazzolo could not fill the eighteen wetland acres on his property, but instead could only build a single home on the small upland portion of the lot. *Palazzolo,* 746 A.2d at 714.[7] By virtue of the fortuity that the SGI corporate dissolution occurred after the passage of the CRMC enabling legislation rather than before, the Rhode Island Supreme Court decided

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6 R.I.P.L. 1971, c. 279, § 1, codified as R.I.G.L. 1956 tit. 46, c. 23. A predecessor statute was enacted in 1965. R.I.P.L. 1965, c. 140, §1, codified as R.I.G.L. 1956 §§ 2-1-13 through 2-1-17. *See Palazzolo,* 746 A.2d at 710. Although not relevant in this case, the Rhode Island Supreme Court mentions the prior statute as though the initiation of any property regulation should put owners on notice of potentially more stringent future administrative or statutory regimes and therefore prevent them from challenging such future regulatory changes. That would constitute unnecessary official acceptance of the unsavory, and as yet unproven, theory that jurisdiction of governmental departments inevitably expands as self-interested bureaucrats seek to enlarge their funding and authority. *See* THE ECONOMIST, *ECONOMICS* 161–62 (1999).

7 Palazzolo was also denied permission to fill only 11.4 acres of wetlands to create a commercial recreational facility. Palazzolo's Petition for *Certiorari* ("P. Pet.") at 14 n.4.

that Palazzolo's investment-backed expectations in his property were not reasonable and that he was not deprived of all beneficial use of his property by CRMC's determinations. *Palazzolo*, 746 A.2d at 715–17.

This "post-enactment purchaser" theory[8]—that a purchaser on notice of a regulation cannot contest the validity of the regulation—has been disparaged by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987), which indicated that property owners' rights should not be altered "because they acquired the land well after the [regulatory] commission had begun to implement its policy." *Id.* In *Del Monte Dunes*, this Court recently upheld a verdict in a regulatory takings case in favor of a developer who purchased the property in question towards the end of the regulatory application process without comment on the "post-enactment purchaser" theory.

Certainly, it is circular to insist that a purchaser loses all right to challenge a regulation simply because he or she is aware at the time of purchase that the regulation *may* be found valid. That is like saying that if someone purchases a home subject to a lien imposed without the knowledge or permission of the prior owner, the purchaser is prohibited from contesting the lien (as opposed to simply his notice of it), no matter how invalid, simply because he had record knowledge of it before buying the

8 As demonstrated in this case, the phrase "post-enactment purchaser" may not be the most accurate encapsulation of the theory, as Palazzolo acquired his property by operation of law, not by purchase. The theory is also referred to as the "coming to the regulation" theory and is often treated as an aspect of the "self-created hardship" doctrine derived from zoning law. *See In re Kellogg*, 197 F.3d 1116, 1121 n.4 (11th Cir. 1999) (concerning "self-created hardship" doctrine).

property. Nevertheless, several courts[9] have adopted the "post-enactment purchaser" theory, contrary to the clear implications of this Court's holdings in *Nollan* and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Supreme Judicial Court of Rhode Island's neighboring state Massachusetts, on the other hand, rejected the "post-enactment purchaser" theory in *Lopes v. City of Peabody*, 417 Mass. 299, 629 N.E.2d 1312 (1994). *Lopes* was decided in light of *Lucas* on remand from this Court. *Lopes v. City of Peabody*, 507 U.S. 981 (1993); *Lopes*, 417 Mass. at 300 n.2, 629 N.E.2d at 1313 n.2. The Massachusetts court held:

> [T]he validity of the ordinance is before us, and [the property owner], a purchaser of land subject to the restriction at the time of his purchase, has every right to challenge the continued application of the restriction. We see no reason to permit challenges to the validity of a zoning enactment only by those landowners who owned land when the zoning provision first affected it. A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.

Lopes, 417 Mass. at 302–03, 629 N.E.2d at 1314–15 (citation

9 *See Palazzolo*, 746 A.2d at 716–17.

omitted).[10]

The absurdity of denying relief to a new property owner who "comes to the regulation" is demonstrated in this case, where Palazzolo acquired the wetland property by action of law upon dissolution of SGI. *Palazzolo,* 746 A.2d at 717. His situation is similar to an heir to an individual decedent, who, under the "post-enactment *purchaser*" theory, would also lose the right to challenge pre-acquisition regulations when the decedent had not been able to develop his property before he died. The Rhode Island Supreme Court dismisses this concern—that all those who acquire property after passage of a regulation are treated similarly, regardless of how the property was acquired—in a footnote. *Palazzolo,* 746 A.2d at 717 n.9. Yet this concern about whose investment backed expectations are at stake illustrates the policy weakness of the "post-enactment purchaser" theory, as discussed in greater detail below. If "coming to the regulation" were a reason to deny Palazzolo the right to develop the wetland property that SGI could have developed, then Palazzolo lost an important and

10 The Massachusetts Supreme Judicial Court in *Lopes* decided only that the "post-enactment purchaser" theory did not apply to challenges to validity of zoning regulations. The court reserved decision on the applicability of the "post-enactment purchaser" theory to takings damages claims, although it posited no reason why its logical position would not apply in the damages area as well. *See Lopes,* 417 Mass. at 302–03 n.7, 629 N.E.2d at 1314 n.7; *Steinbergh v. City of Cambridge,* 413 Mass. 736, 742–43, 604 N.E.2d 1269, 1274 (1992), *cert. denied,* 508 U.S. 909 (1993). In a subsequent decision in a related case, the Supreme Judicial Court affirmed in part a temporary takings damages award for the post-enactment purchaser on other grounds without discussing the "post-enactment purchaser" theory. *Lopes v. City of Peabody,* 430 Mass. 305, 307 n.4, 310, 718 N.E.2d 846, 849 n.4, 850–51 (1999).

valuable property development right simply even though it no longer made economic sense for him to keep up the legal fiction of corporate ownership. The corporate form, while often useful in appropriate circumstances, carries inherent economic inefficiencies in the form of the monetary and time costs of filing fees and paperwork, often requiring professional assistance from lawyers and accountants. In the case of sole owners, such as Palazzolo or the Williamses, the expenses of maintaining the corporate form may often outweigh the benefits conveyed by corporate status.

If, however, Palazzolo had been aware in 1978 that the Rhode Island Supreme Court would adopt the "post-enactment purchaser" theory, he could have taken precautions to avoid the dissolution of SGI and retained ownership of the property under the SGI form (with its inherent expenses) until development of the property had begun. The transfer from SGI to Palazzolo occurred by act of law. It made sense in economic terms to the do away with the corporate fiction. The economic calculus would have been very different if development rights were made dependent on it. The Williamses structured the purchase of their property so that the sale was contingent on septic approval (which they received), but their counsel was not sufficiently astute to make the sale contingent on actual buildability. *See* Am. App. 14 (Purchase and Sale Agreement ¶¶ 25–26). They suffered, while a large-scale developer with higher-powered legal counsel might have arranged for the pre-enactment owner to retain legal ownership of the property and act as a figurehead by applying for all permits under his own name until after the property had been completely developed. In the meanwhile, the purchaser could have been empowered to direct and fund the development and act in all respects as the true owner, while agreeing to indemnify the prior owner for any potential liability of his nominal "ownership."

Thus, a large developer with a skillful attorney could eviscerate the effect of the "post-enactment purchaser" theory for land in corporate ownership through legal fictions including mergers, consolidations, stock transfers, formation of subsidiaries, and corporate divisions. For example, investors in a real estate company that only owned one proposed subdivision could evade the "post-enactment purchaser" theory by transferring their stock to a new purchaser, rather than transferring the real estate. It is ironic that Palazzolo, the successor by law to a solely owned corporation, stands in a worse position under the Rhode Island Supreme Court's decision than a complete stranger would if he had purchased all the stock in SGI from Palazzolo and continued to maintain the corporate fiction. The "post-enactment purchaser" theory would thus invite litigation over the form of the transaction, the nature of the transfers, and the effect of partial transfers (for instance a new investor buying out the partner of a continuing investor).

The "post-enactment purchaser" theory would also disadvantage individual property owners and small-scale developers, such as the Williamses and Palazzolo, who would not be able to utilize sophisticated transactions to protect their development rights. Acceptance of the "post-enactment purchaser" theory would constitute a massive uncompensated taking from small property owners like Palazzolo and the Williamses, while at the same time preserving the development rights of large corporations with perpetual existence. Property owners interested in retaining their development rights would gradually form otherwise unnecessary corporations or sell out to large property development corporations with the resources to manipulate the corporate form as needed to ensure development rights are preserved. The percentage of undeveloped, but developable, property in the hands of large

corporations would increase, making it more difficult for individuals like the Williamses to develop their own property affordably at their own pace. Over time, these effects could have a massive impact on American property ownership patterns and decrease considerably the availability of affordable single-family housing sites.

Although the Rhode Island Supreme Court ignored these powerful policy reasons against the "post-enactment purchaser" theory, it opined that enforcement of the theory was necessary to prevent speculation. *Palazzolo*, 746 A.2d at 716.[11] The

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11 A recent commentator voiced similar moral disapproval of post-enactment purchasers' "gambling" on the outcome of their post-purchase development proposals. Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89, 99–100, 118 (2000). In purely economic terms, however, "speculation" is an inherent motivating factor for any form of investment, whether in stocks, education, or real estate. GRAHAM BANNOCK *ET AL.*, *DICTIONARY OF ECONOMICS* 389 (1998 ed.) ("**speculative motive** The reason which causes people or firms to hold a stock of money in the belief that a capital gain or the avoidance of a loss can be achieved by so doing. It is one of three motives for holding money outlined by [John Maynard] Keynes." (emphasis in original)); THE ECONOMIST, *supra* note 6, at 278–83 (by incorporating opposing views into asset price, speculators provide a valuable economic service). Thus, all property ownership, being a major form of investment, is to a certain extent speculative. It is only in the context of litigation that "speculation" causes concerns because uncertainty about future prospects can lead to highly inaccurate estimations of value and, therefore, unjust recoveries. Under the ripeness doctrine of *Williamson County* and its progeny, however, the uncertainty inherent in a real estate investor's "speculative" purchase price is long past; instead, the courts can evaluate the potential value of the investor's concrete development proposal. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

Rhode Island Supreme Court feared that individuals would purchase land severely limited by environmental restrictions solely to seek compensation for regulatory takings. *Id.* This concern is, however, overstated in light of current regulatory takings ripeness doctrine. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In order to succeed in a takings claim, a property owner must first request regulatory approval for a development plan. As the Williamses can attest, there is considerable expense involved in preparing development plans and applying for their approval, even for a single family home. Am. App. at 1, 4. Given the unpredictable nature and expense of litigation and the prerequisite of prior application for regulatory approval, it is unlikely that a significant number of such purely "speculative" cases will be brought. On the other hand, if takings compensation is denied to post-enactment purchasers, great injustices will be caused to pre-enactment owners (whose sale prices will be considerably reduced) and post-enactment purchasers (who are denied compensation when, by fortuity, the properties they seek to develop were owned by individuals, who have to sell the land itself, instead of corporations, which could simply sell shares).

In addition to its potential for spawning legal fictions and litigation, the "post-enactment purchaser" theory loses its superficial substantive appeal when its underlying premises are examined in light of economic principles. As a property owner's claim that a regulation constitutes a taking is not ripe until the property owner is denied the right to develop, the "post-enactment purchaser" theory puts owners of undeveloped property in an awkward position. *See Williamson County*, 473 U.S. at 186, 195. The theory is contrary to sound public policy because it would produce unwarranted distortions in property ownership and development patterns and cause unnecessary

erosion of transparency in property ownership and development records.[12]

The owners of undeveloped property under a "post-enactment purchaser" regime are in a Catch-22 when a regulation restricting development is passed. The property owners cannot challenge the regulation until they are ready to develop the property and are denied a development permit, even if the regulation would clearly constitute a taking. An owner without adequate capital to develop immediately after the regulation is adopted is in a difficult position. The owner may not want or be able to face the time, expense, uncertainty, and exasperation of challenging the regulation. In such case, under a "post-enactment purchaser" theory regime, the value of the property to the owner is effectively reduced to zero. Without such a restriction, the pre-enactment owner could sell at a modest discount to someone else willing to take on the development challenge, because the purchaser would retain the same right to challenge the regulation.[13] On the other hand, under the "post-enactment purchaser" theory, an owner unwilling or unable to develop the property must either sell to someone else at a steep discount to cover the purchaser's loss

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12 For the importance of transparency in economic systems, see THE ECONOMIST, *supra* note 6, at 209.

13 For a detailed discussion of the economic calculus that pre-enactment owners and post-enactment purchasers go through in determining the appropriate post-enactment sales price discount, see Stein, *supra* note 11, at 107–08, 120–21. Under this system, part of the bundle of rights that the post-enactment purchaser acquires from the pre-enactment owner is the right to challenge the validity of development regulations. *Id.* at 107. The right to challenge the validity of the regulation would thus follow the land. *Id.*

of development rights or retain the property until such time as he or she is finally able to raise the capital to develop the property, regardless of other potentially more beneficial ways that the owners might want to use their capital.[14] This disincentive to sell at a fair price under the "post-enactment purchaser" theory is in the nature of a long-disfavored restraint on alienation of property. *See Iglehart v. Iglehart,* 204 U.S. 478, 484 (1907); *Board of County Supervisors v. United States,* 48 F.3d 520, 526 (4th Cir.), *cert. denied,* 516 U.S. 812 (1995).

On the other hand, an owner with adequate capital at the time the regulation is passed may have an incentive to seek to develop the property immediately, so as to receive the benefits of the regulatory challenge (the recognition of his or her development rights) when he or she is capable of exercising those rights and before future uncertainties take their toll on the owner's ability to develop the property. Without a "post-enactment purchaser" rule, an owner might prefer to hold property thinking that in the long run the surrounding area will grow and development of the property will be warranted. At that time, assuming the area has grown, ordinarily the owner could then develop the property or sell the property to a developer who would retain whatever development rights the original owner had. If the "post-enactment purchaser" theory were applied, however, the property might well be developed prematurely because it is the only way for the owner to realize the benefits of a developed property (*i.e.,* higher value per square foot), as a subsequent purchaser (without the right to challenge the regulation) would not have the same development rights as the original owner. Since the surrounding area will not

14 For a discussion of the sharp loss in value to property owners under a "post-enactment purchaser" regime immediately after a development regulation is adopted, see Stein, *supra* note 11, at 99–100.

by then have grown out to the development, the price for the developed property will be lower than it would be in the future and may thus not be the best investment for the owner, nor the best use of the property at the time. This incentive for premature development would thus unnecessarily contribute to the suburban "sprawl" of leapfrogged development that has been much decried recently. *See, e.g.,* Gregg Easterbrook, *Suburban Myth,* NEW REPUBLIC, Mar. 15, 1999, at 18; Bruce Katz & Jennifer Bradley, *Divided We Sprawl,* ATLANTIC MONTHLY, Dec., 1999, at 26.

Thus, economic considerations and policy implications demonstrate that the incentives of a "post-enactment purchaser" theory regime would cost society a great deal in terms of lost openness, increased sprawl, inappropriate development, and lost investment value to small property owners. At the same time, the principal "benefit" of the "post-enactment purchaser" theory—that someone acquiring property with knowledge that it is affected by a regulatory scheme is prevented from challenging the regulation's overbreadth—can easily be evaded by clever maneuvering by large corporations with well paid legal staffs.

II. THE POST-ENACTMENT PURCHASER SHOULD BE COMPENSATED FOR REGULATORY TAKINGS AFTER REJECTION OF A DEVELOPMENT APPLICATION.

One recent commentator, after a wide-ranging discussion of the economic inequities of the "post-enactment purchaser" theory, suggests a novel approach to the issue. Professor Stein would bar post-enactment purchasers from compensation, but consider the pre-enactment owner to have a takings claim that ripens upon sale. Stein, *supra* note 11, at 130–31. Stein acknowledges that his proposal is economically equivalent to the more straightforward approach of allowing takings

compensation for post-enactment purchasers after rejection of a development proposal. *Id.* at 108–09. He suggests that his proposal is superior on two grounds: (1) courts are sometimes wary of allowing legal claims to be bought and sold; and (2) uncooperative or unavailable prior owners might be necessary to provide evidence of their own "reasonable investment-backed expectations." *Id.* at 109. *See Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978).

As to the first issue, while courts do look askance at some types of transfers of legal claims, particularly those that might unnecessarily stir up litigation, other types of claims transfer are well accepted in the law. For example, subrogation is a common and long-recognized method of transferring legal claims. *See* 8 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 204 (2d ed. 1937); 3 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* *123 n.1, 124 (O.W. Holmes, Jr., ed., 12th ed. 1873). Stein cites no good policy reason to discourage transfer of development rights claims that pass with the land.

As to the second issue, even if the investment-backed expectations of the pre-enactment owner were controlling, those expectations (required to be *reasonable*) could be established objectively by reference to the pre-enactment regulatory scheme and the development history of similarly situated neighboring properties. There is no reason that the post-enactment purchaser's reasonable investment-backed expectations should be discounted. While the post-enactment purchaser has some expectation that he may not be permitted to develop the property at all, absent adoption of the "post-enactment purchaser" theory, that result would generally be a low probability. It is far more likely that the post-enactment purchaser anticipated being able to develop the property or else he would not have purchased it. In fact, in light of the Fifth Amendment, it would be entirely reasonable for a post-

enactment purchaser to believe that he would be able to overturn an unjust property regulation when he was ready to develop the property. While the price he paid may be somewhat discounted because of the possibility of litigation over development, the non-discounted price (fair market value absent the challenged regulatory regime) can usually be determined by comparison with similarly situated neighboring properties developed under pre-enactment grandfathering protections.

Stein's proposal also fails to address adequately: (1) the impact of *Williamson County* and its progeny on the ripeness of pre-enactment owners' claims before property development is proposed; (2) the difficulty in ascertaining the value of the property taken by inverse condemnation without a development plan in place, which would require the hypothetical calculation of what the property would be worth in its current state with and without the regulation; and (3) the incentive his proposals give to governments to enact confiscatory property development regulations in the hope that pre-enactment owners (in particular small, unsophisticated property owners) will fail to enforce their rights upon sale, resulting in a small actual cost to the state for a major policy change at the expense of many pre-enactment owners. *See* Stein, *supra* note 11, at 93. *See also Armstrong v. United States,* 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."), *quoted in Del Monte Dunes,* 526 U.S. at 702; Durham, *Efficient Just Compensation as a Limit on Eminent Domain,* 69 MINN. L. REV. 1277, 1297, 1300–01 (1985) (under the "fiscal illusion," government entities underestimate costs of their actions unless required to include

such costs in their budgets); Daniel A. Farber, *Economic Analysis and Just Compensation,* 12 INT'L REV. L. & ECON. 125, 130 (1992) (economic theory predicts that externalities will produce overproduction of the product that does not absorb its true cost); William A. Fischel, *Eminent Domain and Just Compensation, in* 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 34, 36 (Peter Newman ed., 1998) (concerning economic incentives for inefficient takings when government fails to consider societal costs).

Stein's proposal also fails to account for the encouragement it gives to litigation, potentially clogging the courts with difficult-to-assess pre-enactment purchaser takings claims. Under the Stein regime, the pre-enactment purchaser would almost inevitably be forced to sell at a steep discount and then take his or her chances with the courts on a regulatory takings claim. It is a far more efficient use of economic and litigation resources for the regulatory takings claim to pass with the property and allow the post-enactment purchaser to make a property development proposal when the land is most suitable for development. Under such a legal regime, pre-enactment owners would receive fair, market-based prices for their properties (with modest discounts reflecting the realistic probabilities of their properties' development). Inevitably, in many cases, the post-enactment purchaser's proposal would be approved, in whole or with minor revisions, and regulatory takings litigation would be superfluous. Professor Stein's proposal therefore ignores practical considerations as well as this Court's standing jurisprudence as developed in *Williamson County* and its progeny. This Court should utilize Stein's economic insights into the injustice of the "post-enactment purchaser" theory, while rejecting his impractical and novel proposal of takings damages for pre-enactment owners.

In light of this analysis and this Court's decision in *Lucas,*

a complete regulatory denial of any economically beneficial or productive use of property, such as Palazzolo's loss of the use of the wetlands at issue here or the Williamses' inability to build a single family home on their own five-acre property, should constitute a categorical taking regardless whether the property remains in the hands of the same owner who held the property when the regulation was passed. The "post-enactment purchaser" theory would promote legal fictions, encourage litigation, constitute a restraint on alienation, and stimulate premature development leading to unnecessary "sprawl." The policies behind the Fifth Amendment's protection of property ownership would be vitiated if original owners are prohibited from challenging regulations until they are ready to develop while subsequent owners are prevented from challenging regulations when the property is ready to be developed. The Court should reject the "post-enactment purchaser" theory in order to ensure fairness to property owners nationwide and to prevent government from imposing the costs of confiscatory regulation on some property owners alone—those who sell at a substantial discount in light of the legal regime as well as those (like the Williamses) who are trapped because they were unaware of the extent to which their property development rights were impaired by the existing regulatory scheme.

CONCLUSION

For the reasons stated above, this Court should reverse the Rhode Island Supreme Court and grant the Petitioner his requested relief.

Respectfully submitted,

W. FREDERICK WILLIAMS, III,
and
LOUISE A. WILLIAMS,

By their attorney,

Counsel for Amici Curiæ Michael E. Malamut
Counsel of Record
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Dated: November 24, 2000

APPENDIX

The Providence Journal

OF THE Providence Journal-Bulletin: SINCE 1829 MASSACHUSETTS TUESDAY, MAY 31, 1994/ 4 75¢ WEEK BY CARRIER

Williams

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Am. App. I

Wetlands rules their nightmare

■ A Massachusetts couple have had to dig up the septic system and the foundation for the house they planned to build in Little Compton.

By PETER LORD
Journal-Bulletin Staff Writer

When Louise A. and W. Frederick Williams III bought 5 acres to build a house amid the pastures and summer cottages of Little Compton six years ago, the concept of wetlands didn't mean much to them.

Now, the word "wetlands" conjures nightmares.

Because the state Department of Environmental Management ruled their property was wetlands, the Williamses last week had to rip up their house foundation and leaching field and plant trees so their land will revert to its natural state.

By their account, the Williamses have invested $78,000 in their land and $30,000 in building materials, paid $20,000 to a builder and spent more than $60,000 on legal fees — and all they have to show for it is a muddy hole along West Main Road and a lot of bitterness towards state environmental officials.

Believing they have been victimized by arrogant regulators, the Williamses have testified before a state Senate committee, written to every member of the General Assembly and had their story told in a national property-rights publication.

There is great dispute over the merits of the Williamses' case, but their story and others like it have helped prompt a low-key but concerted effort in the General Assembly to weaken Rhode Island's wetlands regulations.

A dozen bills are pending. Two of them would forbid DEM to pursue anon-

Turn to **WETLANDS**, *Page A-9*

Journal-Bulletin/ANDY DICKERMAN

PLANS HALTED: Louise Williams stands on her Little Compton property.

Wetlands

Continued from Page One

ymous tips of illegal actions. One would require that it prepare a report estimating the cost of every environmental decision. Another would allow construction within 10 feet of pristine wetlands; the limit is now 200 feet.

Environmentalists have responded by forming a coalition of 27 groups, filing some bills of their own and insisting they will compromise no more.

Both sides agree that the future of development in Rhode Island is at stake. With much of the state's dry, flat land already developed, builders are increasingly seeking to use wetlands.

Late last week, representatives of both sides of the issue said legislative leaders were telling them that none of the bills would pass. Instead, a special commission will be appointed to review the state's wetlands law and recommend changes to the General Assembly.

Rep. Edward J. Smith, D-Tiverton, chairman of the Joint Committee on the Environment, confirmed Friday that he and other leaders favor a commission. "The general consensus was the General Assembly, not being an authority on wetland issues, couldn't do anything on all this," he said.

Now, both sides are jockeying over the commission.

"We're not in favor of a commission at all," says Alison Walsh, issues coordinator at Save the Bay. "The other side is not being reasonable. They just don't want regulation. But we're not going to lie down anymore and compromise."

Ross Dagata, director of the Rhode Island Builders Association, said his members believe the state has gone too far with its wetlands policies and designated far too much land as wetlands.

Dagata said the builders plan to go ahead with a threatened lawsuit against a new set of wetlands regulations instituted two months ago. At the same time, Dagata said he's anxious to "sit down and work out a better law."

Wetlands are considered important for sponging up flood waters, recharging underground water supplies and providing wildlife habitat.

The question of just what constitutes a wetland is often subject to debate. While few disagree that streams and ponds are wetlands, biologists also denote as wetlands areas where the soil is soggy, or where certain plants grow that are common to areas that are periodically wet.

DEM rules substantially limit construction on or near wetlands. For instance, the law forbids building within 200 feet of a river or stream, but one bill would allow building within 10 feet.

Each year about 32 employees in DEM's Division of Wetlands process 600 to 700 applications to build near wetlands. Because their rulings can amount to a red light against building, their determinations can spell the difference between big money and a worthless piece of property.

The debate over protecting wetlands has reached the highest levels of state government.

In December, at a hearing on proposed new wetlands regulations, Lt. Gov. Robert A. Weygand and Joseph R. Paolino Jr., who at the time was director of the state Department of Economic Development, led critics opposed to further tightening of the state's wetlands regulations.

After some minor changes, DEM enacted the new rules.

But when Governor Sundlun fired DEM Director Louise Durfee last March, environmentalists were concerned that he was caving in to builders who thought she was enforcing wetlands laws too strictly. Sundlun quickly pledged that he wouldn't tamper with the new wetlands rules.

DEM changes training

The consequences of the debate over wetlands become startlingly real when you step on the lot where the Williamses just ripped out their foundation and septic system.

It appears to be very wet land. The ground is too soggy to cross without boots. Skunk cabbage and cattails grow right up to the edge of the foundation.

As Louise Williams supervised efforts to tear out the last vestiges of a house on her property, she couldn't hold back her anger.

She and her husband, both corporate executives, are used to doing things right, she said. They talked to the local building official, hired two local engineers and dealt regularly with DEM on their new septic system.

"DEM keeps saying we should have known there were wetlands,"

FROM PAGE ONE

Journal-Bulletin/ANDY DICKERMAN

JUST VISITING: Louise Williams walks through her Little Compton property, which she had hoped to call home.

she says. "But I'm not an engineer or an architect or a lawyer or a botanist. That's why we got professional people. This just isn't right. If you own 5 acres in the United States, you have the right to live on it."

Louise Williams insists that DEM's septic system inspectors visited her property several times and should have alerted her to the wetlands.

DEM officials now concede it would have been better if the inspectors sounded the alarm. But septic inspectors at the time focused just on septic systems, and were not trained to look at other problems. DEM now is providing broader training.

Catherine Robinson Hall, the lawyer representing DEM wetlands regulators, says Louise Williams neglected to mention that DEM, early on, advised her to consult DEM for a verification of the location of wetlands on the property. She never did, Hall said.

Dean Albro, chief of DEM's wetlands section, says that if the Williams case was at all marginal, DEM would have reached a compromise. But the land, he said, is saturated. Cattails grew out of the foundation after it was poured, he said.

The Williamses went through protracted hearings and administrative and legal appeals — that led ultimately to rejection by the Rhode Island Supreme Court.

The couple live in a condominium in Concord, Mass. Instead of moving to Little Compton, they just visit.

And instead of enjoying the "birds, flowers, gentle breezes and the hope of a peaceful refuge" that they described in one letter, they are left with bitterness.

"What has happened to us is that DEM strung us out until the legal costs are greater than the value of the property," says Mrs. Williams. "How does a citizen protect himself from a government agency that doesn't tell the truth, has deep pockets funded by the public, and can string you out forever? They are the king, they are the emperor."

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POLITICS & POLICY

Wider Property-Owner Compensation May Prove A Costly Clause in the 'Contract With America'

By CHRISTOPHER GEORGES
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON — As congressional Republicans move to pare billions of dollars from existing government-benefit programs for the poor and the elderly, they may also be creating a costly new benefit program for another group: property owners.

As part of their "Contract with America," House Republicans would require the federal government to compensate private landowners or corporations when any federal regulation lowers the value of their property or company by 10% or more. The goal of the proposal is to put a stop to excessive government regulation. But the result could be a costly new drain on the Treasury.

"Yes, it seems skewed, but it's also a matter of fairness," says Roger Pilon of the conservative Cato Institute. "As the regulatory state has grown in leaps and bounds, property owners are losing huge amounts."

Movement to Lower Threshold

At issue are "property takings." When the government takes private property to build a road, for example, it must, in keeping with the Constitution's Fifth Amendment, compensate the owner for the value of that property. Traditionally, the courts have allowed compensation only in cases where government action wiped out all, or nearly all, of a property's value.

But the recent explosion in the number, breadth and cost of federal regulations — particularly in protecting wetlands, endangered species and worker safety — has triggered a movement to lower that threshold. That's because the recently enacted regulations frequently restrict property owners from building on, or even altering, their property. While those restrictions may not entirely wipe out the property's value, they frequently reduce it to a fraction of its former worth.

"Tens of thousands of people have been left with an illusion of ownership, but without the value of it," says Carol LeGrasse of the Property Rights Foundation of America.

Consider Louise and Frederick Williams, who say their Little Compton, R.I., property plummeted in value to less than $30,000 from $260,000, largely because of its categorization as wetlands. The Williamses, who in 1988 had started construction on a new home on the five-acre plot, were ordered by state environmental officials to tear down the partly built structure and, at their own expense, follow a precise 13-point property-restoration plan provided by regulators.

"Not only did we have to plant what they dictated," Mrs. Williams says, "but we had to make sure the trees were alive and well when they inspected them the next year. Maintaining our property the way they like it has been very expensive."

Mrs. Williams says that, including lost property value, lawyers' fees and other expenses, the regulations have cost them more than $300,000 over the past six years. "I've lost my faith and trust in government," she says.

'Out of Control' Regulation

Joining private landowners have been business leaders, who contend that the recent expansion in regulation in areas such as worker safety have burdened them unfairly. "The pendulum has swung too far," says Jack Faris, president of the National Federation of Independent Business. "Regulation is out of control."

Recent advances have come at both the state and federal levels. Since 1992, 12 states have passed some form of property-rights legislation. About the only recent setback came in November, when Arizona voters overturned a state law requiring state agencies to consider whether regulations constitute a taking.

Opponents of the legislation, primarily environmentalists, labor unions and local preservation organizations, argue that the compensation movement is really no more than a backdoor attempt, funded largely by big business, to gut environmental and other federal regulations. U.S. regulators, they say, who would be faced with paying out billions of dollars to enforce the law, would no doubt be less inclined to seek compliance. Lawmakers, too, would be more cautious about writing such laws in the first place.

Opponents also say that the plan would foist a heavy burden on the taxpayer. Although there are no firm estimates on how much the proposed law would cost the Treasury, a 1992 Congressional Budget Office study reported that it would take at least $10 billion to compensate owners of wetlands for lost property value.

"Republicans want a balanced budget, and then they propose a new multibillion-dollar entitlement program for property owners," says John Echeverria, counsel for the National Audubon Society. "How they reconcile the two I have no idea."

One answer comes from Peggy Reigle of the Fairness to Landowners Committee: "Welfare and food stamps are not protected under the Constitution. Property rights are."

As environmentalists and property owners trade barbs, the public appears to support both sides. Polls show that vast majorities consider themselves environmentalists and believe that the federal government does too little to protect the environment. At the same time, similar majorities also agree that there is not enough federal protection of property rights.

paying out billions of dollars to enforce the rights

Am. App. 4

AGREEMENT

THIS AGREEMENT entered into by and between WARD L. HAUCK of New York, New York and LOUISE G. CRIMMINS (f/k/a Louise G. Hauck) of Somers, New York

hereinafter called Seller, and W. FREDERICK WILLIAMS, III and LOUISE A. WILLIAMS of Concord, Massachusetts

hereinafter called Buyer:

WITNESSETH:

Seller agrees to sell and convey to Buyer certain real estate, hereinafter called the "premises", situated on the west side of West Main Road in Little Compton, Rhode Island and containing 5.2 acres, more or less and being further depicted as Lot 8 on Plat 7 of the Little Compton Tax Assessors' Records as presently constituted.

Conveyance is to be made subject to taxes assessed as of December 31, 1985 and to municipal zoning regulations if any.

The premises shall include all fixtures now annexed thereto or built in or fitted especially therefor and designed to be used and enjoyed in connection therewith, including, but not limited to, electric fixtures, heating and central air conditioning equipment, water heating equipment, screens, screen doors, storm windows, venetian blinds, window shades, curtain or drapery rods (but not curtains or drapes), awnings, trees, plants, shrubs, fences, outside television antennas and weather vanes, if any; but excluding, nevertheless, such of said fixtures, if any as are lawfully removable by tenants of Seller or leased from utility companies.

Am. App. 5

IN CONSIDERATION WHEREOF, Buyer agrees to purchase the premises, paying to Seller the sum of Seventy-Eight Thousand ($78,000.00)----------Dollars, of which Seven Thousand Eight Hundred ($7,800.00)----------Dollars, (hereinafter called the "Binder") has been paid this day, and the remainder of Seventy Thousand Two Hundred ($70,200.00)----------Dollars is to be paid upon delivery of the deed, as hereinafter provided.

IT IS MUTUALLY AGREED BY AND BETWEEN THE PARTIES HERETO THAT:

1. Seller shall convey the premises by a good and sufficient Warranty Deed of Seller in the usual form conveying a good, marketable and insurable title to the same, free from all encumbrances, to Buyer (or to the Nominee designated by Buyer if Buyer shall notify Seller of such designation in writing at least ten days prior to the time provided for the delivery of the deed).

2. The Deed shall be delivered and the consideration paid to the law offices of Leary and Holland, 1340 Main Road, Tiverton, Rhode Island on or before 10/17/86 at 2:30 o'clock P. M. unless full performances of said obligations shall have taken place prior to that time.

3. Seller shall deliver to Buyer, at the time of the delivery of the deed, full possession of the premises: (a) in the same condition in which they now are, reasonable use and wear of the buildings thereon and damage by fire or other hazards, insured against under Paragraph 4 hereof, excepted, (b) not in violation of zoning, subdivision, plat, building or minimum housing standards, restrictions, ordinances or statutes, and (c) free of all tenants and occupants.

4. Seller shall, at his expense, keep the buildings on the premises insured for the present amount until the time of the delivery of the deed, insuring them against loss by fire and other hazards, including the freezing of pipes and plumbing fixtures. In case of any loss: (a) Seller may use the insurance proceeds to restore the premises to substantially their former condition at any time prior to the time provided for the delivery of the deed or (b) if Seller shall not have so restored the premises, then Seller shall pay over or assign to Buyer all sums recovered or recoverable on account of said insurance upon payment of the purchase price, or if the premises have not been restored to substantially their former condition at the time provided for the delivery of the deed, Buyer may, at his option, terminate this Agreement and the binder shall be returned to him together with any interest thereon. The determination that the premises have been restored to substantially their former condition shall be made solely by Buyer.

5. Real estate taxes assessed on the premises as of December 31, 1985 , for the calendar year 1986 , shall be adjusted on the basis of a calendar year beginning January 1, 1986 , Seller paying prorata for the period from the beginning of such calendar year to the date of the delivery of the deed, and Buyer paying or assuming the balance of said taxes, provided, however, that if the amount of such taxes cannot be ascertained at the time of such delivery, it shall be conclusively presumed that the amount of the taxes to be adjusted equals the tax for the next prior tax year and the

adjustment shall be made upon the basis of such prior tax year's tax. All other taxes and assessments, including those improvements, which are a lien upon the premises shall be paid in full by Seller at the time of the delivery of the deed, except as provided in Paragraph 6 hereof.

6. Rents, fuel, water charges, fire district assessments, sewage use charges and assessments, etc., shall be adjusted as of the date of the delivery of the deed.

7. Personal checks without certification will not be accepted in payment of the purchase price, and, if for any reason Seller shall refuse the tender of a certified check or the check of a bank, Buyer shall be allowed a reasonable time in which to make a tender in cash.

8. If Seller shall be unable to give title or to make conveyance, or to deliver possession of the premises, all as herein stipulated, or if at the time of the delivery of the deed the premises do not conform with the provisions hereof (it being especially understood and agreed that Seller shall not be under any obligation to attempt to cure by litigation or otherwise any defect which may be found to exist in the title to the premises or to remove any encumbrance upon the title to the premises not voluntarily placed thereon by Seller or to correct any violations of subdivision, plat, building or minimum housing standard regulations or restrictions), then the binder shall be refunded and all other obligations of the parties hereto shall cease and this Agreement shall be void and without recourse to the parties hereto, unless Seller elects to use reasonable efforts to remove any

defects in title, or to deliver possession as provided herein, or to make the premises conform to the provisions hereof, as the case may be, in which event Seller shall give written notice of such election to Buyer at or before the time provided for the delivery of the deed, and thereupon the time for the delivery of the deed shall be extended for a period of thirty (30) days. If at the expiration of the extended time, Seller shall have failed to remove all defects in title or to deliver possession or to make the premises conform, as the case may be, all as herein agreed, then, at Buyer's option, the binder shall be forthwith refunded and all other obligations of all parties shall cease and this Agreement shall be void without recourse to the parties hereto. Buyer shall have the election, at either the orignal or any extended time for the delivery of the deed, to accept such title as Seller can deliver to the premises in their then condition and to pay therefor the purchase price without deductions, in which case Seller shall convey such title but without warranties against such defects.

9. Upon default by Buyer, Seller shall have the right to retain the binder, together with any interest thereon, as liquidated damages, unless Seller otherwise notifies Buyer in writing, within thirty (30) days after the time herein provided for the delivery of the deed, claiming either additional damages and/or specific performance.

10. This Agreement shall be binding upon and inure to the benefit of the respective heirs, executors, administrators, successors and assigns of the respective parties hereto and if two or more persons are named herein as Buyer, their

obligations hereunder shall be joint and several. The terms "Seller" and "Buyer" whenever used herein and any pronoun referring thereto shall be construed in the singular, plural, masculine, feminine or neuter in accordance with the manner in which this Agreement is executed whenever the context shall require.

11. To enable Seller to make conveyance as herein provided Seller may, at the time of the delivery of the deed, use the purchase money or any portion thereof to clear the title of any or all encumbrances or interests. The proceeds from the sale of the premises may be held by the Buyer or his attorney until such time as satisfactory discharges or releases are received by him for all liens on the title. At said time, the proceeds from the sale shall be tendered to Seller or his attorney.

12. The acceptance of the deed by Buyer or his nominee, as the case may be, shall be deemed to be a full performance and discharge of every agreement and obligation of Seller herein contained or expressed, except such as are by the terms hereof to be performed after the delivery of the deed.

13. Time shall be deemed to be of the essence.

14. Buyer acknowledges that Buyer has inspected the premises and all improvements thereon and in purchasing the same has not relied upon any warranties, representations or statements of the Seller or Broker as to its condition. Buyer agreeing to accept the premises "as is" and without expectation as to their suitability for any particular purpose whether or not expressed in this Agreement. ~~Unless the provisions of~~

LEARY AND HOLLAND

~~23-19.5-1 et seq. of the General Laws of Rhode Island, 1956,~~ as amended, entitled, "Percolation Tests and Water Table Elevation Determinations" have otherwise been complied with, the parties agree that all parties to the conveyance shall execute and file prior to the transfer of the premises a written waiver of the requirements of such Chapter, a copy of ~~which is attached hereto and made a part hereof as Exhibit "B"~~.

15. Any notice to any person which is required or may be given under the provisions of this Agreement shall be deemed to have been given when a written copy of such notice is delivered to such person to whom such notice is to be given or when mailed by United States certified or registered mail, postage prepaid, return receipt requested, addressed to such person at the address in this Agreement indicated, or, if no such address is indicated, then to his last and usual place of abode.

16. Pursuant to the provisions of 2-1-26 of the General Laws of Rhode Island, 1956, as amended, Seller hereby discloses to Buyer that all or part of the premises have previously been or could be determined to be a coastal wetland, bog, fresh water wetland, pond, marsh, river bank or swamp as those terms are defined in Chapter 1 of Title 2 of the aforesaid General Laws of Rhode Island. Buyer hereby releases the Seller and waives in its entirety the provisions of 2-1-26 and 27 of the General Laws of Rhode Island, 1956, as amended.

~~17. This Agreement is contingent upon the express~~ condition that the Buyer may, at his sole cost and expense, have an insect, ~~mechanical~~ (plumbing, heating and electrical) ~~and structural inspection(s) made upon the premises within~~

LEARY AND HOLLAND

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~~fourteen (14) days of the date of this Agreement. In the~~ event that insect infestation or other damage may be found, the Buyer shall notify the Seller immediately and in any event not later than twenty-one (21) days after the signing of said Agreement, and may, at his option, terminate this Agreement and all deposits paid shall be promptly refunded to the Buyer, unless the Seller may elect, at the Seller's sole cost and expense, to rid the property of all infestation of insects and to repair any mechanical or structural damage before the time provided for the delivery of the deed. Failure to notify Seller in accordance with the above, and/or failure to have the inspection(s) made in a timely fashion as outlined above shall constitute a waiver of this contingency ~~by the Buyer~~.

~~18. Sale of the premises is contingent on there being~~ an adequate and potable supply of water thereon. Said determination shall be made solely by the Buyer. Buyer has fourteen (14) days from the date of this Agreement to conduct any and all testing. In the event that the supply is inadequate or not potable, the Buyer shall notify the Seller immediately and in no event not later than twenty-one (21) days after the signing of said Agreement, and may, at his option, terminate this Agreement and all deposits paid shall be promptly refunded to the Buyer, unless the Seller may elect at the Seller's sole cost and expense, to provide an adequate and potable supply of water before the time provided for the delivery of the deed. Failure to notify Seller in accordance with the above, and/or failure to have the testing(s) made in a timely fashion as outlined above shall ~~constitute a waiver of this contingency by the Buyer.~~

~~19. This Agreement is made under the express condition~~ that the Buyer shall be able to obtain a (conventional) (MGIC) (FHA) (Other - specify) first mortgage with an institutional first mortgage lender at conventional rates and terms in an amount not less than Dollars. If, after a reasonable and diligent effort has been made by the Buyer, he is unable to obtain such a mortgage commitment, this Agreement shall become null and void and all deposits paid shall be promptly refunded, provided the Buyer shall have notified the Seller within five (5) days of the date of his notification of his inability to obtain such a mortgage commitment, otherwise this provision shall become null and void and the Agreement shall remain in full force ~~and effect.~~

~~20. The parties hereto agree that~~ Dollars of the purchase price is to be paid by the Note of the Buyer, payable to the Seller, dated even date with the Deed of the Seller, to be paid in years bearing interest at percent per annum, payable monthly in equal monthly installments of Dollars, the first payment to be made and secured by a Power of Sale mortgage in the usual form upon the said premises subject to a prior mortgage to in the amount of Seller is under no obligation, however, to accept any Note ~~of Buyer's Nominee~~.

~~21. The Seller agrees that in order to induce the~~ title company selected by the Buyer to issue a Mortgagee's Policy on the subject premises without the standard exceptions, he will sign the Affidavit contained in Exhibit "C", which is attached hereto and made a part ~~hereof, prior to or at the closing.~~

22. The "Binder", as hereinbefore referred to shall be kept in the Broker's escrow or trustee's account earning current Money Market or an equivalent rate of interest. Upon closing, any and all interest earned on said account shall be paid over to Seller. In the event that Buyer cancels this Agreement in accordance with the terms hereof, said interest shall be paid over to Buyer.

~~23. Seller represents to Buyer that said premises~~ are to be conveyed together with a satisfactory means of access and egress by a motor vehicle and for the installation of electric power and telephone services from ~~to the premises to be conveyed~~.

24. Seller represents that he is not a foreign person as defined under Setion 1445 of the Internal Revenue Code and will sign an Affidavit to that effect in form satisfactory to Buyer's attorney at closing.

25. This Agreement is contingent upon Buyer receiving percolation and water table test results satisfactory to buyer. Said testing to be at Buyer's expense.

26. This Agreement is contingent upon Buyer obtaining State approval for the design of an individual septic system for the proposed future construction of a four bedroom single family residence on the premises. Said approval to be obtained at Buyer's expenses.

27. Subject to easements of record.

It is understood that a broker's commission of Ten (10) percent of the full purchase price of the premises is to be paid to Miriam Scott, Ltd. hereinafter called the "Broker" by Seller upon delivery of the deed and payment of the balance of the purchase price by Buyer to Seller. Buyer represents to Seller that he dealt solely and exclusively with the Broker in negotiating the purchase of the premises.

We, the parties hereto, severally declare that this instrument contains the entire agreement between the parties and that it is subject to no understandings, conditions, or representations other than those expressly stated, and that Rhode Island law shall apply to its construction.

IN WITNESS WHEREOF, this instrument has been executed in several counterparts, each of which shall be deemed to be original, as of the 13TH day of August, 1986.

EXECUTED IN PRESENCE OF:

WITNESS — WARD L. HAUCK

WITNESS — LOUISE G. HAUCK

WITNESS — W. FREDERICK WILLIAMS, III

WITNESS — LOUISE A. WILLIAMS

BROKER:

MIRIAM SCOTT

WARRANTY DEED

WARD L. MAUCK of New York, New York and LOUISE G. CRIMMINS of Somers, New York, for consideration paid grant to W. FREDERICK WILLIAMS, III and LOUISE A. WILLIAMS of 7 Greenfield Lane, Concord, Massachusetts 01742, as Tenants by the Entirety with WARRANTY COVENANTS:

That certain lot or parcel of land located on the westerly side of West Main Road in the Town of Little Compton, County of Newport, State of Rhode Island, bounded and described as follows:

BEGINNING at a concrete post in the westerly side of West Main Road at the southeasterly corner of the parcel herein described and at the northeasterly corner of land now or formerly of Fort Church Properties Co., Inc.;

THENCE westerly to a concrete post at the easterly end of a stone wall and continuing westerly along said stone wall, bounded southerly by said Fort Church Properties land, a distance of 204 feet, more or less, to a corner;

THENCE turning and running northwesterly, bounded southwesterly by said Fort Church Properties land a distance of 630 feet, more or less, to a corner and land now or formerly of John G. Ledes and Sally C. Ledes;

THENCE northeasterly, bounded northwesterly by said Ledes land a distance of 438 feet, more or less, to an angle;

THENCE turning an interior angle of 165°0' and running easterly, bounded northerly by said Ledes land, a distance of 139 feet to West Main Road;

THENCE turning an interior angle of 90° and running southerly on West Main Road a distance of 643 feet, more or less, to the point and place of beginning;

However otherwise bounded and described, meaning and intending to convey and hereby conveying by this deed all of the land acquired by these grantors by deed from C. George Taylor and Eleanor G. Taylor dated October 7, 1968 and recorded on October 17, 1968 in the Records of Land Evidence for said Town of Little Compton in Book 44 at page 70.

WITNESS our hands this day of , 1986.

Ward L. Mauck

Louise G. Crimmins
f/k/a Louise G. Mauck

STATE OF NEW YORK
COUNTY OF NEW YORK

In Queens on the 29th day of August, 1986 before me personally appeared Ward L. Mauck, to me known and known by me to be the person executing the foregoing instrument, and he acknowledged said instrument, by him executed, to be his free act and deed.

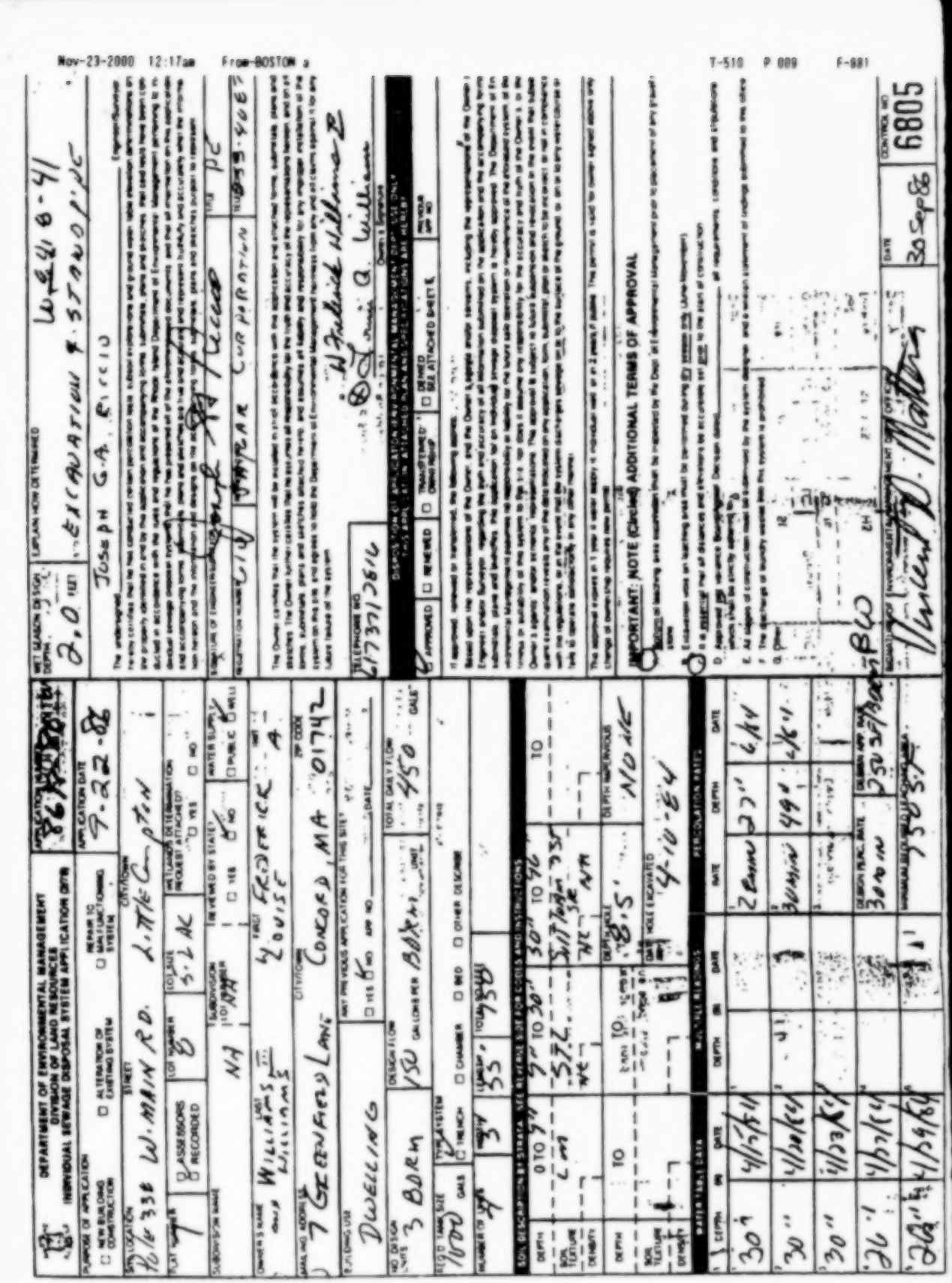
Notary Public
Printed Name:
My Commission Expires:

VINCENT T. HOBAN JR.
Notary Public, State of New York
No. 41-4740998
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1987

STATE OF RHODE ISLAND
COUNTY OF NEWPORT

In Little Compton on the 4th day of September, 1986 before me personally appeared Louise G. Crimmins, to me known and known by me to be the person executing the foregoing instrument, and she acknowledged said instrument, by her executed, to be her free act and deed.

Notary Public
Printed Name: Marianne Scott
My Commission Expires:
June 30, 1991



Nov-23-2000 12:17am From-BOSTON a T-510 P 009 F-881

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
DIVISION OF LAND RESOURCES
INDIVIDUAL SEWAGE DISPOSAL SYSTEM APPLICATION 6805

Joseph G.A. Riccio — Lot 41 6-41

Exchange St. Concord, Mass.

7 Greenfield Lane — Concord, MA 01742

Dwelling — 3 Bdrm — 450 gpd

Approved — Date 30 Sep 86

W. Frederick Williams

Louis A. Williams

Am. App. 18

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
38 State Street
Providence, R. I. 02903

Date: 12/12/88

To: W. Frederick Williams, III
Louise A. Williams
7 Greenfield Lane
Concord, Mass.

Plat 7 Lot 8

Application No. 8810-84

Street Location: Pole 338
W. Main Rd.

CERTIFICATE OF CONFORMANCE

This Certificate of Conformance means that the Individual Sewage Disposal System which has been installed under the above application number appears to substantially conform with that indicated on the plan and specifications submitted. PERMISSION IS THEREFORE GRANTED FOR OCCUPANCY OF THE BUILDING AND FOR UTILIZATION OF THE SEWAGE DISPOSAL SYSTEM. By forwarding a copy of this certificate to the municipal building official, he is hereby authorized to issue a Certificate of Occupancy for the building provided all other local requirements have been met.

This Certificate is based solely upon the representations of the Owner and his agents who are responsible for the proper installation of this system. The Department of Environmental Management has approved the application in reliance upon those representations and is not responsible for any of the construction notes, details, specifications, distances or elevations indicated on the application, plan or specifications.

This approval is subject to future suspension and revocation in the event that subsequent examination reveals any of the data indicated on any application, plan or specifications to be incorrect, or not in compliance with applicable regulations or in the event that the system discharges sewage on or to the surface of the ground, or, on or to any watercourse or, fails to operate satisfactorily in any other manner.

Authority: _____

Individual Sewage Disposal Section
Division of Land Resources
Department of Environmental Management

Refer to Reverse Side
cc: Building Inspector